

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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Federal Communications Commission
Office of Secretary

In the Matter of

Amendment of the Commission's Rules
to Permit Flexible Service Offerings
in the Commercial Mobile Radio Services

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WT Docket 96-6

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COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. THE COMMISSION HAS THE STATUTORY AUTHORITY TO REGULATE SERVICES PROVIDED USING CMRS SPECTRUM UNDER SECTION 332.....	4
II. REGULATION OF CMRS FIXED USE UNDER SECTION 332 SERVES THE PUBLIC INTEREST AND IS CONSISTENT WITH THE ACT.....	10
CONCLUSION	16

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The Cellular Telecommunications Industry Association ("CTIA")¹, hereby submits its Comments in the above-captioned proceeding.²

INTRODUCTION AND SUMMARY

In the First Report and Order in this proceeding, the Commission concluded that "fixed services, excluding broadcast services, are permissible service offerings on spectrum allocated for broadband and narrowband CMRS," and modified its CMRS rules to allow CMRS spectrum to be used "on a co-primary basis for

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular, broadband personal communications service ("PCS"), enhanced specialized mobile radio, and mobile satellite service providers. CTIA represents more broadband PCS carriers, and more cellular carriers, than any other trade association.

² Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket 96-6, FCC 96-283 (released August 1, 1996) ("First Report and Order" or "Further Notice," as appropriate).

fixed services, mobile services, or any combination of the two."³ CTIA wholeheartedly endorses the Commission's decision to liberalize the use of CMRS spectrum in this manner. As described by the Commission, its decision offers administrative simplicity and certainty, which will encourage innovation and experimentation.⁴ Allowing flexible use of CMRS spectrum also will stimulate competition,⁵ encourage efficient spectrum use, and promote diversity in the types and combinations of services offered to the public.⁶

However, CTIA is concerned that several of the proposals outlined in the Further Notice if adopted would essentially undercut the public interest benefits described above. In the Further Notice, the Commission seeks comment on proposals to regulate the services offered by CMRS providers on a service-by-service basis, thereby potentially subjecting these services to pervasive regulation under the Communications Act of 1934 and reintroducing the specter of inconsistent state regulation. Such a result is contrary to the public interest and inconsistent with Section 332 of the Communications Act. Imposing unnecessary regulation is particularly wasteful in light of the Commission's express authority to preserve the public interest benefits of its

3 First Report and Order at ¶ 2.

4 See id. at ¶ 19.

5 See id. at ¶ 20.

6 See id. at ¶ 22.

flexible use decision by continuing to apply the CMRS model in this context.

The Flexible Use Notice⁷ proposed to "treat fixed wireless local loop services as an integral part of the CMRS services offered by a CMRS provider, so long as the carrier otherwise offers interconnected, for-profit mobile service to the public on licensed CMRS spectrum."⁸ However, in the Further Notice, the Commission retreated from this sound policy and legal judgment. Instead, the Further Notice determined that it was "premature to attempt a final comprehensive determination regarding the regulatory treatment of these various types of fixed services that may be offered by licensees,"⁹ and that the approach suggested in the Flexible Use Notice should be modified to provide "guidelines for determining when fixed wireless services may fall within the scope of CMRS regulation."¹⁰ In essence, the Further Notice addresses two fundamental questions with regard to the regulatory treatment of fixed use of CMRS spectrum: First, does the Commission have the statutory authority to regulate fixed use of CMRS spectrum under section 332? Second, assuming the Commission possesses that authority, should the fixed use of

⁷ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, Notice of Proposed Rulemaking in WT Docket 96-6, 11 FCC Rcd 2445 (1996) ("Flexible Use Notice").

⁸ Flexible Use Notice at 2449.

⁹ Further Notice at ¶ 47.

¹⁰ Id.

CMRS spectrum be regulated under Section 332? In response to these questions, the Commission has clear statutory authority to regulate flexible uses of CMRS spectrum under section 332. In fact, such an outcome is the only decision consistent with the Communications Act of 1934, as amended, and with the public interest.

In sum, the Commission should:

- recognize and exercise its statutory authority to regulate any service offered using CMRS spectrum under Section 332 of the Act;
- permit state regulation of CMRS wireless services only where the wireless service has supplanted the incumbent local exchange service provider and the CMRS provider offers the only available local exchange service in that market.

I. THE COMMISSION HAS THE STATUTORY AUTHORITY TO REGULATE SERVICES PROVIDED USING CMRS SPECTRUM UNDER SECTION 332.

As an initial matter, CTIA notes that the Further Notice is curiously devoid of any suggestion that the public interest will be furthered by regulating fixed services offered by CMRS providers outside of the Section 332 CMRS model. Thus, it appears that the Commission is primarily concerned that it may lack the requisite authority to regulate fixed services as CMRS. Fortunately, as demonstrated below, any such reticence is completely unfounded.

In the Further Notice, the Commission seeks comment on "alternative statutory interpretations"¹¹ of the term "mobile

¹¹ Id. at ¶ 49.

service" and the regulatory consequences of those interpretations. CTIA maintains that the definition of "mobile service" is sufficiently flexible to include "fixed" services within its ambit, and that Congress foresaw and in fact favored such a result. Section 332 and its accompanying legislative history demonstrate that the Commission has clear authority to classify which services should be considered "personal communications services," as well as to establish other definitions of "mobile services" in successor proceedings. Moreover, Congress specifically contemplated that "mobile services" could encompass fixed as well as mobile applications. This flexibility, in essence, permits the Commission to include fixed service offerings within the definition of mobile services. The regulatory consequences of this conclusion, and the policy implications flowing therefrom, are discussed in detail in the next section.

The definition of "mobile services" is important because Section 332 of the Act, including the state rate and entry preemption provisions of Section 332(c)(3)(A) and federal regulatory forbearance provisions of Section 332(c)(1), is directed to the regulation of "mobile services." Thus, the application of these provisions depends upon whether the subject service qualifies as a "mobile service." As demonstrated below, Congress granted the Commission sufficient latitude to define mobile services such that it may cover fixed services as well.

The Act defines a mobile service as a:

radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding."¹²

The Commission seeks comment on essentially two possible interpretations of this definition. On one hand, the Commission posits that "mobile service" could be limited to radio communication involving a "mobile station;"¹³ on the other hand, the Commission seeks comment on whether the reference to the PCS proceeding allows the Commission to establish alternative definitions of "mobile service" in successor proceedings.¹⁴ As demonstrated below, interpreting the definition as requiring the use of mobile stations is inconsistent with both law and policy. Rather, the Commission should interpret the definition of mobile service as including the services which may be offered by PCS

¹² 47 U.S.C. § 153(27).

¹³ See Further Notice at ¶ 49. The Act defines a "mobile station" as "a radio-communication station capable of being moved and which ordinarily does move." 47 U.S.C. § 153(28).

¹⁴ See Further Notice at ¶ 50.

licensees. Such a result is supported by both the legislative history of the provision as well as sound policy.

The flexibility necessary to include fixed services within the definition of mobile services was provided statutorily by Congress. In its 1993 revision to the "mobile service" definition, Congress supplemented the existing definition of "mobile service" by including: **"any service** for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), **or any successor proceeding.**"¹⁵ The House Report explained that it made "conforming changes" to the "mobile services" definition by "adding to it a definition of licensed personal communications services that the Commission would establish as part of its proceedings."¹⁶ As the Conference Report further explicates, "mobile service" is defined to "clarify that the term . . . includes the licenses to be issued by the Commission pursuant to the proceedings for personal communications services."¹⁷

In other words, the term "mobile service" includes those services which may be offered by PCS licensees as determined by

¹⁵ 47 U.S.C. § 153(27) (emphasis added).

¹⁶ H.R. Rep. No. 111, 103d Cong., 1st Sess. 262 (1993) ("House Report")..

¹⁷ H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 496 (1993) ("Conference Report").

the Commission in the PCS docket or any successor proceeding. By specifying the services which may be offered by PCS licensees, the Commission effectively modifies the definition of "mobile service" subject to Section 332. Having determined that CMRS providers, including PCS licensees, may provide fixed services, the Commission has effectively found that fixed services offered by CMRS providers are "mobile services," and therefore subject to regulation as CMRS under Section 332.

This result is consistent with and furthers Congress' intent when it amended Section 332 in 1993. Congress amended Section 332 to ensure that "services that provide equivalent mobile services are regulated in the same manner."¹⁸ For this reason, Congress established "uniform rules" to govern CMRS offerings and directed the Commission "to review its rules and regulations to achieve regulatory parity among services that are substantially similar."¹⁹ Therefore, a finding that PCS licensees may offer fixed services as CMRS, while other CMRS licensees may only offer fixed services subject to the full panoply of state and federal regulations otherwise applicable to such services, is fundamentally inconsistent with the clear intent of Congress and contrary to law.

The Commission's alternative interpretation of the definition of "mobile service" is entirely inconsistent with the

¹⁸ House Report at 259.

¹⁹ Id.

legislative history described above. Specifically, the Commission states that:

One could also read the definition of "mobile service" to require the use of "mobile stations" and the "and includes" language which precedes the description of the three enumerated services to mean that they are examples. In that case, a service provided with a PCS license would have to include the use of a "mobile station" to come within the definition of "mobile service" and consequently be considered in the definition of "commercial mobile service."²⁰

This interpretation is counterintuitive and unpersuasive.

Indeed, the legislative history of the 1993 Congressional modifications to the definition of "mobile service" makes clear that the specification of the PCS proceeding was meant to extend the definition of "mobile service," not merely to provide a possible example of a "mobile service."²¹ The House Report explained that the "mobile service" definition was modified by "adding to it a definition of licensed personal communications services that the Commission would establish as part of its proceedings."²² Moreover, the Conference Report explained that "mobile service" is defined to "clarify that the term . . . includes the licenses to be issued by the Commission pursuant to

²⁰ Further Notice at ¶ 49.

²¹ Under the Commission's proffered reading of the definition, the reference to PCS services is not used as an example which clarifies or explains the previous clauses, rather, it is merely a possible example -- assuming PCS services otherwise meet the definition. The Commission does not explain how this could possibly add to the understanding of the definition.

²² House Report at 262 (emphasis added).

the proceedings for personal communications services."²³ Thus, by stating that the term "mobile service" "includes. . . any service for which a license is required in a personal communications service established pursuant to [the PCS proceeding] or any successor proceeding,"²⁴ Congress specified that all services which PCS licensees are entitled to offer are included in the definition of "mobile service." There is no evidence that Congress intended to include only those PCS services which use a "mobile station," and the Commission should not frustrate Congress' intent here.²⁵

II. REGULATION OF CMRS FIXED USE UNDER SECTION 332 SERVES THE PUBLIC INTEREST AND IS CONSISTENT WITH THE ACT.

As demonstrated in the preceding analysis, the Commission possesses the requisite statutory authority to regulate flexible uses of CMRS spectrum, including fixed services, comprehensively under Section 332. However, rather than exercising this

²³ Conference Report at 496.

²⁴ 47 U.S.C. § 153(27).

²⁵ Moreover, there is evidence that Congress foresaw that CMRS providers could develop and offer fixed services in the future and declined to exclude such services from the definition of "mobile service." In 1993, the Senate's proposed definition of "mobile service" was identical to the House version, except that the Senate version specified that "the term does not include rural radio service or the provision by a local exchange carrier of telephone exchange service by radio instead of by wire." Conference Report at 497. Significantly, the Conference agreement adopted the House definition, and not the Senate Amendment. Thus, when faced with the question of whether to exclude fixed services from the definition of "mobile service," Congress declined to do so, thereby evidencing its support for the provision of fixed services by CMRS providers and, by extension, regulation of such services under Section 332.

authority, the Commission proposes to consider the regulatory treatment of services provided by CMRS providers on a case-by-case basis,²⁶ and proposes to adopt guidelines under which such an assessment would be made. Specifically, the Commission proposes to adopt a rebuttable presumption that services offered by CMRS providers using CMRS spectrum are to be regulated under Section 332, and to allow petitioners to rebut that presumption on a service-by-service basis.²⁷

As explained in detail below, the Commission's proposed approach is inconsistent with the policy underlying Section 332, and sacrifices the public interest benefits associated with allowing flexible use of CMRS spectrum in the first place.

Regulating fixed services offered by CMRS providers outside of Section 332 is inconsistent with that provision and its underlying policy. Congress amended Section 332 in 1993 in order to "establish a Federal regulatory framework to govern the offering of all commercial mobile services."²⁸ Congress found that the then-present regulatory regime regulated similar services provided by similarly-situated providers in a disparate manner.²⁹ Congress revised Section 332 to permit federal forbearance and to require state preemption to prevent the

²⁶ See Further Notice at ¶ 53.

²⁷ See *id.* at ¶ 54.

²⁸ Conference Report at 490 (emphasis added).

²⁹ House Report at 259-60.

disparities in the regulatory regime applicable to CMRS from inhibiting the growth of CMRS.³⁰ Forbearance from federal regulation of CMRS and preemption of state regulation of CMRS is appropriate because CMRS providers lack market power in either the market for mobile services or the market for fixed services. Thus, the Commission's proposal to regulate CMRS on a service-by-service basis is entirely contrary to the clear intent of Section 332.

Indeed, in 1993 Congress anticipated that CMRS providers could in the future use wireless technology to provide local loop substitutes and yet retained CMRS treatment for such services. Specifically, in Section 332(c)(3)(A), Congress provides that:

Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.³¹

As the Conference Report clarifies:

the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service **if subscribers have no alternative means of obtaining basic telephone service.** If, however, several companies offer radio service **as a means of providing basic telephone service** in competition with each other, such that consumers can choose among alternative providers of this service, **it is not the intention of the conferees that States should be permitted to regulate these competitive**

³⁰ Id. at 260.

³¹ 47 U.S.C. § 332(c)(3)(A).

services simply because they employ radio as a transmission means.³²

In other words, Congress specifically recognized, and approved of, wireless carriers providing "basic telephone service" in competition with wireline carriers. In fact, Congress only reserved the states' authority to regulate the rates charged by wireless carriers in the provision of such service if the wireless carrier was the sole local exchange services provider in the relevant geographic market. Significantly, the fact that wireless carriers use radio technology as the means to provide basic telephone service did not require the retention of state jurisdiction. This knowledge, coupled with Congress' granting the Commission the opportunity to define and redefine PCS, shows that Congress intended Section 332 to apply.

In addition to the clear statutory provisions and legislative history of Section 332, broad public interest benefits support regulation of CMRS fixed services under Section 332. As noted above, the Commission offers no public interest justification for regulating any service offered by a CMRS provider outside of Section 332. On the other hand, the record of this proceeding demonstrates that definite, powerful and clear benefits will result from uniformly applying Section 332 to fixed services offered by CMRS providers.

³² Conference Report at 493 (emphasis added).

For example, in the First Report and Order, the Commission found that limiting the potential use of CMRS to specific applications "could lead to difficult definitional questions about what constitutes 'wireless local loop' or other defined services."³³ Ironically, wrestling with difficult definitional questions is exactly what the Commission will be required to do to resolve challenges to the treatment of a particular service as CMRS.

Similarly, the Commission expressed concern that restricting fixed uses to specific configurations might cause carriers to "be reluctant to pursue some potentially efficient options out of concern that they would be considered to fall outside the definition of our prescribed service definition."³⁴ Under the Commission's current proposal, although carriers will be allowed to provide fixed services, they will have little means of anticipating the regulatory model under which such services will fall. Moreover, should the Commission deem a service as falling outside Section 332 regulation, regardless of the efficiency and value associated with the provision of this service, the Commission will have provided CMRS carriers with a regulatory incentive to avoid these burdens by not providing the service. These results are entirely contrary to the public interest.

³³ First Report and Order at ¶ 19.

³⁴ Id.

Finally, CTIA notes that the "presumption" the Commission proposes to apply -- that all services offered by CMRS providers are regulated as CMRS -- is unlikely to be of much value. First, the most likely complainants are competitors (or would-be competitors) who will seek to use the regulatory classification of a fixed service as a competitive weapon. The perverse incentive to engage in such regulatory gamesmanship is well-established.³⁵

Second, the framework proposed by the Commission would allow complainants to demonstrate that a particular service offering is not CMRS based upon evidentiary showings deemed by the Commission to be probative of the appropriate regulatory classification of the service. Unfortunately, many, if not all, of the "possible factors" which may be considered as evidence of the proper regulatory status are essentially under the control of the CMRS provider. This situation will lead to claims that the CMRS provider should bear the burden of proof, thereby rendering the "presumption" little more than a naked promise.

³⁵ See Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself, 347 (1978) ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition.")

CONCLUSION

For these reasons, CTIA respectfully requests that the Commission recognize and exercise its statutory authority to regulate any fixed service offered using CMRS spectrum under section 332 of the Act.

Respectfully submitted,

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